Supreme Court, U. S.
FILED
JUN 12 1975
MICHAEL RODAK, JR., CLERK

No. 74-1562

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

ROSS B. MERETSKY,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Ross B. Meretsky prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Sixth Circuit entered March 17, 1975.

OPINIONS BELOW

The opinion of the District Judge denying a Motion for New Trial dated March 28, 1974, is printed as Appendix "A", *infra*. The opinion of the Court of Appeals is not reported. It is printed in Appendix "B", *infra*.

JURISDICTION

The Judgment of the Court of Appeals was entered on March 17, 1975 (Appendix "B", *infra*). A timely Petition for Rehearing was denied on May 13, 1975 (Appendix "C", *infra*). Jurisdiction is conferred on this Court by 28 USC 1254.

QUESTIONS PRESENTED FOR REVIEW

I.

By what yardstick must a court measure circumstantial evidence to determine if it is sufficient to convict beyond a reasonable doubt? Must such evidence exclude every reasonable hypothesis of innocence?

II.

Is a defendant in a criminal trial entitled to severance where he is named in only two of nine counts; because of the joinder he is circumscribed in his proofs that he had no stake or interest in the conspiracy; and the evidence disclosed two or more conspiracies rather than the one charged and, had the indictment conformed with the proofs, joinder would have been impermissible under Rule 8 FRCrP?

III.

In a conspiracy trial involving multiple defendants, is the defendant, upon his request, entitled to have the jury instructed at the time of the reception of hearsay evidence that such evidence shall not be admissible against the defendant to prove his participation in the conspiracy?

IV.

Is a defendant denied a fair hearing on appeal when his counsel is deprived of a reasonable opportunity for oral argument; must share the allotted time with a non-lawyer; and the court in rendering its decision gives no reasons for its decision on most of the substantial questions raised?

In addition to the foregoing questions which are argued in the reasons for granting the Writ, petitioner prays that in the event that the Petition for Certiorari is granted, unlimited as to scope, that he be allowed to argue the following additional questions.

V.

Is the defendant denied his right to be informed of the nature of the accusation against him and of his right to be proceeded against only on indictment of a grand jury, where he is charged with one conspiracy but the proofs at trial show him to be involved, if at all, in a substantially smaller subsidiary conspiracy?

VI.

Is it error to instruct the jury that proof of the accomplishment of the objective of the conspiracy is persuasive evidence of the existence of the conspiracy?

VII.

Is it error to instruct the jury that an offer of sale of securities considerably below market price indicates knowledge of illegality where there is no evidence of such an offer of sale, or the instruction fails to tell the jury that one must knowingly make such an offer in order for the inference to be justified?

CONSTITUTIONAL PROVISIONS AND FEDERAL RULES INVOLVED

United States Constitution, Amendment V, provides in part:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury . . . nor be deprived of life, liberty, or property, without due process of law; . . .

United States Constitution, Amendment VI, provides in part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation; . . .

Rule 8(b) of the Federal Rules of Criminal Procedure provides:

> Joinder of Defendants. Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or

> offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

Rule 14 of the Federal Rules of Criminal Procedure provides:

> If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires. In ruling on a motion by a defendant for severance the court may order the attorney for the government to deliver to the court for inspection *in camera* any statements or confessions made by the defendants which the government intends to introduce in evidence at the trial.

STATEMENT OF THE CASE

Petitioner was named with three others in a nine-count indictment charging interstate dealing in stolen and counterfeit securities. The indictment, based upon 18 USC, §§ 2, 371, 2314, and 2315, is printed as Appendix "D", *infra*.

Count One charged that defendants and five named co-conspirators conspired to deal in stolen and counterfeit securities. Count Nine charged petitioner and one other defendant with transporting counterfeit securities in interstate commerce on September 20, 1970.

Counts Two through Eight charged defendants other than petitioner with criminal dealings in stolen and counterfeit securities. Petitioner was convicted of both counts and sentenced to imprisonment for three years.

I.

THE STANDARD BY WHICH THE LOWER COURTS MEASURED THE SUFFICIENCY OF THE EVIDENCE AGAINST PETITIONER.

Petitioner, a Detroit attorney, acknowledged that he handled counterfeit securities for his clients, two alleged co-conspirators, but denied that he had any knowledge that the stock was counterfeit. The record presents a substantial question concerning the sufficiency of the evidence to establish petitioner's guilty knowledge.[1]

Petitioner challenged the yardstick by which the Sixth Circuit has measured the sufficiency of circumstantial evidence since 1954. In rejecting the challenge, the Court of Appeals said:

> In this Circuit, "circumstantial evidence alone can sustain a guilty verdict and . . . to do so, circumstantial evidence need not remove every reasonable hypothesis except that of guilt." *United States vs. Scales,* 464 F 2d 371 (6th Cir. 1972). [1b, *infra.*]

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[1] We recognize that no lawyer worth his salt would tender to this Court for review a naked question involving sufficiency of the evidence. In determining whether to grant review in this case, we believe that it was unnecessary for the Court to assess the sufficiency of the evidence but merely the standard used below. To the extent that the Court may nevertheless wish to know the nature of the evidence against petitioner, we attempt the nearly impossible task of stating it briefly and in a nonargumentative fashion in Appendix "E", *infra.*

II.

THE DENIAL OF SEVERANCE.

Prior to trial Petitioner moved for a severance because, among other things, seven of the nine counts did not involve him at all. The motion was denied.

During trial a Motion for Severance was made under the following circumstances. An unindicted co-conspirator, Joseph Pagoto, received approximately $240,000 from fraudulent loans involving counterfeit Bethlehem Steel stock. He shared the proceeds from these loans with a co-defendant, Daniel Cimini. There was no evidence that petitioner was in any way connected with these fraudulent loans. There was no evidence that petitioner received any money from the proceeds of the loans as his stake and interest in the venture.

The government did introduce a cashier's check for $3900 made payable to petitioner and endorsed by him in blank. The check had been purchased from Cimini's share of a $50,000 loan from a Detroit bank for which counterfeit Bethlehem stock had been fraudulently pledged.

Petitioner objected to the admission of the check and alternatively moved for severance on the grounds that the check was delivered to another attorney in Detroit for legal services in unrelated criminal proceedings involving Anthony Cimini, a nontestifying co-defendant, and full explanation of the transaction would disclose Cimini's two prior criminal convictions.

In the absence of the jury Philip Gillis, a Detroit attorney, testified that he received the $3900 check from petitioner and deposited it in his Clients' Trust Account from which he paid the attorney fees and expenses in

preparing a Petition for Writ of Certiorari and Petitions for Rehearing, relating to Anthony Cimini's two prior federal convictions.[2]

The trial judge denied severance and refused to allow petitioner to introduce the printed Petition for Certoriari and the Petitions for Rehearing because they would have disclosed Anthony Cimini's criminal record. Gillis was allowed to testify that he received the check for legal services.

In a Motion for New Trial petitioner renewed his request for severance, alleging that the indictment charged a single conspiracy, yet the evidence established two or more conspiracies, and there was no evidence that petitioner participated in a conspiracy to deal in stolen securities, and the massive evidence concerning stolen securities severely prejudiced him.[3]

In denying petitioner's Motion for a New Trial on the severance question, the trial court said:

> Defendant claims there were two conspiracies—one relating to stolen securities, the other to counterfeit securities. Such a division is totally artificial, based more on a distinction between the means adopted by the conspirators to effectuate their purposes than on evidence of qualitatively separate agreements. Just as a conspiracy to dis-

[2] Petitioner offered to withdraw his objection to the Exhibit and his Motion for Severance if the government would stipulate that the $3900 payment was unrelated to the conspiracy and was in payment for legal services actually rendered to Anthony Cimini. The government refused to so stipulate. In summation to the jury, the government attorney argued that the transaction was a "maneuver" which "I don't quite understand."

[3] To set forth the evidence upon which this claim was based would be repetitive of Appendix "E", *infra*, to which we refer the Court.

> tribute a variety of drugs is not factually separable into distinct conspiracies dealing with each kind of drug, even though certain members may have dealt in only one variety, so the consipracy proven in this case was a single, integrated, concertive action for the purpose of disposing of illegal securities, whether counterfeit or stolen. The fact that Meretsky never became personally involved with the stolen securities is irrelevant.
>
> * * * * *
>
> If, as seems evident from the verdict, the jury accepted the testimony of Witness Pagoto, the jury might well have concluded that Meretsky may have been involved in an aspect of the case involving the stolen securities.
>
> * * * * *
>
> Finally, even if one were to conclude that the two conspiracies, rather than one, were shown [the conclusion is warranted that] the variance was not prejudicial and did not affect any of the defendant's substantial rights. [7a-9a, *infra.*]

In reviewing this ruling, the Court of Appeals said:

> The District Court's denial of Appellant Meretsky's Motion for Severance was within its discretion under Rule 8 F. R. Crim. P. We find no abuse thereof. [1b-2b, *infra.*]

III.

THE FAILURE TO GIVE LIMITING INSTRUCTIONS.

Several times during the trial petitioner requested an instruction that the acts, deeds and statements of other defendants and co-conspirators could not be binding on petitioner until his participation in the conspiracy was established. On each of four occasions when the request was made, the trial judge denied it with a suggestion that he would cover the matter at an appropriate juncture in the case. We suggest that the epitome of the judge's instructions is contained in the following excerpt following petitioner's third request for instructions:

> At the close of the case, or at appropriate juncture in the case, ladies and gentlemen, I may have some instructions for you, perhaps, most probably, at the time that I instruct you finally on what the law will be, and I will also have some instructions with regard, as to how you approach the matter of determining a conspiracy and what its elements are and how the statements that are allegedly made by one conspirator may or may not in a given situation be binding on the other co-conspirators.
>
> But, Mr. Barris [petitioner's trial counsel], a case has got to start somewhere. We are really only in the first principal witness that the government has furnished so far, and I am not going to interrupt repeatedly to tell the jury what I have already said to them, and that is, that they should listen carefully, and then on the instructions on the law that I will give them at the appropriate time, they will be guided as to what their deliberations will be.

In his final instructions, the Court did not give the promised instruction. Instead, the jury was charged:

> In deciding whether a particular defendant was a member of the conspiracy, you should consider whether on all the evidence the defendant knowingly and purposely entered the conspiracy.[4]

IV.

THE APPEAL TO THE SIXTH CIRCUIT.

Following conviction of petitioner and the Cimini brothers,[5] separate Notices of Appeal were filed. After petitioner filed his brief in the Court of Appeals, the government moved to consolidate the three appeals. The motion was granted over petitioner's opposition, and the case was set for oral argument allowing twenty minutes per side. Two weeks before the scheduled argument, petitioner moved for additional time for oral argument, but the motion was never ruled upon.

The Ciminis' attorney of record in the Court of Appeals was a Detroit lawyer admitted to practice in the Sixth Circuit. However, on oral argument the Ciminis were represented by one Sterling Brown, who, speaking for two of three appellants, used approximately two-thirds of the time allotted for oral argument.

Petitioner raised eight substantial questions on appeal.[6] In disposing of the appeal, the Court of Appeals referred specifically only to petitioner's claim that the evidence

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[4] No objection was made to this instruction.

[5] The fourth defendant pled guilty during the trial.

[6] The eight questions, as presented to the Court of Appeals, are set out as Appendix "F", *infra*.

against him was insufficient and the denial of his Motion for Severance. The balance of the issues raised by petitioner were disposed of in the following language:

> Upon consideration of the briefs, the record, and oral argument, finding no error in the jury instructions, and no ground appearing which requires reversal of the convictions, the Judgments of Conviction should be, and they hereby are, Affirmed. [2b, *infra.*]

Petitioner filed a Motion for Rehearing. While it was pending, his counsel was interviewed by an agent of the F.B.I. who disclosed that Sterling Brown was not a lawyer, had never attended law school, and apparently learned whatever legal knowledge he had from being a jailhouse lawyer while serving two years in the federal penitentiary at Terre Haute, Indiana. Petitioner brought this to the attention of the Court of Appeals with a Supplement to his Motion for Rehearing. In denying the Motion for Rehearing, the Court of Appeals declined to consider the matters contained in the Supplemental Motion for Rehearing (Appendix "C", *infra).*

REASONS FOR GRANTING THE WRIT

I.

THE COURTS OF APPEALS ARE NOT IN AGREEMENT ON THE STANDARD BY WHICH THEY MEASURE THE SUFFICIENCY OF EVIDENCE IN A CRIMINAL CASE.

The standard of certainty to support a conviction is proof beyond a reasonable doubt. *In Re Winship,* 397 US 358 (1970). Unfortunately, *Winship* did not define the concept of reasonable doubt. Left to their own devices the Courts of Appeals, relying upon varying interpretations of *Holland vs. United States,* 348 US 121 (1954), have become bogged down in irreconcilable conflict over the measure of sufficiency of circumstantial evidence to support a conviction.[7] The Fifth and Tenth Circuits have rather consistently held that the test of sufficiency of circumstantial evidence to support a conviction is whether, with the evidence viewed in the light most favorable to the government, reasonable minds could conclude that the evidence is inconsistent with the hypothesis of innocence. *Cuthbert vs. United States,* 278 F 2d 220, 224-225 (CA 5, 1960); *Surrett vs. United States,* 421 F 2d 403, 405 (CA 5, 1970); *United States vs. Nazien,* 504 F 2d 394 (CA 5, 1974); *LaConte vs. United States,* 330 F 2d 700 (CA 10, 1964); *Lewis vs. United States,* 420 F 2d 1089 (CA 10, 1970).

Until recently the Ninth Circuit usually followed a *similar rule. Urquidi vs. United States,* 371 F 2d 654

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[7] The vast majority of criminal prosecutions rely upon circumstantial evidence if only to prove knowledge or intent. Even the armed bandit caught in the act must have his intent found from the inferences drawn from his conduct and words.

(1967); *Miller vs. United States,* 382 F 2d 583 (1967). However, in *United States vs. Nelson,* 419 F 2d 1237 (1969), after recognizing that "the substance of the standard to be applied [in measuring the sufficiency of circumstantial evidence] is subject to much confusion and dispute", *id,* 1411, the Ninth Circuit aligned itself with those Circuits which have rejected the rule of the Fifth and Tenth Circuits.

The Eighth Circuit, too, followed the Fifth and Tenth for a while, e.g., *Tri-Angle Club vs. United States,* 265 F 2d 829 (1959), but that holding was later substantially limited; see Justice Blackmun's opinion as a Circuit Judge in *United States vs. Kye,* 411 F 2d 120 (1969).

Prior to this Court's decision in *Holland, supra,* the Sixth Circuit applied the inconsistent-with-innocence theory, but in *United States vs. Conti,* 339 F 2d 10, the Court read *Holland* as requiring it to overrule its prior decisions. Some panels of the Court have had difficulty sticking to the new rule. See, for example, *United States vs. Wages,* 458 F 2d 1270 (1972) and *United States vs Roberts,* 465 F 2d 1373 (1972), both of which relied upon and followed Fifth Circuit authority. They were overruled in *United States vs. Morgan,* 469 F 2d 83 (also 1972).

In *Phillips vs. United States,* Petition for Certiorari pending, No. 74-703, the same question is tendered to this Court.[8] There we pointed out that in *Holland* the Court was concerned with a proper jury instruction and not with a rule of law to measure the sufficiency of evidence. The Court in later decisions made it quite clear that it was not abandoning the principle that circumstantial evidence must not be equivocal on the question of guilt.

[8] In that Petition we erroneously stated that only the Fifth Circuit follows the inconsistent-with-innocence rule.

> . . . to establish the intent, the evidence of knowledge must be clear, not equivocal.
>
> *Direct Sales vs. United States,* 317 US 703, 711 (1943).
>
> The proof by the very nature of the crime [of conspiracy] must be circumstantial . . . but this does not mean . . . that the evidence may be equivocal . . . *id* at 714.

Perhaps it is inappropriate at this may-we-get-in stage to burden the Court with specific references to the evidence. But indulge us one brief paragraph in order to make an important point. Petitioner was acting in his professional capacity as an attorney.[9] When he first received the counterfeit securities from his client, he "insisted"[10] that the stocks' authenticity be verified through the transfer agent. Bethlehem's method of transferring stock, coupled with the confusion of stock records in 1970, made this impossible. Petitioner then requested that the stock be authenticated directly with Bethlehem. Although Bethlehem received the inquiry concerning the stock, inexplicably the stock clerk made no response to the inquiry. When petitioner found that he was holding Bethlehem stock in street form, apparently worth more than half a million dollars, he immediately stamped his name on each certificate to render them nonnegotiable and thus irrevocably connected himself with the counterfeit certificates. More could be said of the evidence tending to show his lack of guilty knowledge, but this is enough to make our point.

[9] He had been admitted to practice barely a year.

[10] We quote the testimony of the stockbroker and not petitioner.

Business frauds today often require the services of an attorney or accountant. Whether or not the attorney shares the knowledge and criminal intent of his client will usually turn on rather subtle inferences from the evidence. If this court should decide to grant review, whatever standard it chooses by which to measure the proofs should be a strict one. Cf. *Scales vs. United States*, 367 US 203, 232 (1961):

> . . . Smith Act offenses, involving as they do subtler elements than are present in most other crimes, call for stricter standards in assessing the adequacy of the proof . . .

If an attorney is to be visited with the sins of his clients on no more evidence than was presented here, then we are indeed in a perilous profession.

We are not asking the Court to resolve a conflict between Circuits involving only a rule of pleading, nor a conflict on an instruction concerning a seldom-encountered issue, nor do we concern the Court with whether the "i's" have been dotted and the "t's" crossed on an application for a wiretap authorization. The conflict relates to a substantial right of a defendant on trial. As long as the conflict exists, persons can be convicted of serious crime in 38 States on evidence which would be held insufficient in the States of the Fifth and Tenth Circuits.

II.

PETITIONER WAS ENTITLED TO SEVERANCE.

Petitioner's three motions for severance were on separate and distinct grounds. The pretrial motion for severance was based upon Rule 8 FRCrP on the grounds that the indictment included seven counts which had no relationship to petitioner's activity whatsoever. If this were the only issue on severance, we would not ask the Court to review the point, even though the Sixth Circuit is clearly wrong in saying that a Motion for Severance under Rule 8 is within the discretion of the trial judge. No other Circuit has ever held that Rule 8 severance is a matter of discretion. *Ingram vs. United States,* 272 F 2d 567, 569 (CA 4, 1959); *United States vs. Spector,* 326 F 2d 345, 350 (CA 7, 1963).

> If joinder is improper [under Rule 8(b)], severance is not a mere matter of discretion, and the overwhelming weight of authority is that a joint trial cannot be regarded as harmless error. Indeed there would be no point in having Rule 8 if the harmless-error concept were held applicable to it.
>
> Wright, *Federal Practice and Procedure,* § 144.

Our second motion for severance made during trial was based upon Rule 14 FRCrP. The basis of the motion was that joinder of the petitioner's case with that of Anthony Cimini severely prejudiced him because of the limitations placed upon his proofs concerning the transaction involving the $3900 check. He could not show the substantial legal work and related expenses in preparing the Petition

for Certiorari.[11] and other work which would have disclosed Cimini's prior criminal convictions. To determine this point the Court would have to review the record carefully to determine the degree of prejudice to petitioner. The ruling on that point would probably not be important enough, standing alone, to justify Supreme Court review.

It is our third point, however, which we believe cries out for Supreme Court intervention. That, coupled with the first two motions for severance, would provide the Court an opportunity to write a valuable opinion on the entire question of severance. Our third motion for severance was made in a postconviction motion on the grounds that the proofs at trial did not support the allegations of the indictment of a single, integrated conspiracy. This motion was bottomed on both Rule 8 and Rule 14. Cf. Wright, *Fed. Practice and Procedure,* §§144, 222, 226.

There was not a scintilla of evidence that petitioner dealt with the stolen securities; participated in any scheme involving them; or even knew of their existence. He knew none of the individuals with whom Pagoto and Dan Cimini were dealing in stolen securities. He received not one penny from the nearly half a million dollars in fraudulent loans obtained by Pagoto, Cimini and their confederates. His only activity related to his handling of the counterfeit stock in June, 1970, and later on September 20 accompanying them to Florida.

The trial judge in denying the motion for new trial said:

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[11] As $3900-petitions go, it wasn't all that bad. Only seven justices voted to deny it. *Cimini v United States,* 400 US 911.

> If, as seems evident from the verdict, the jury accepted the testimony of Witness Pagoto, the jury might well have concluded that [petitioner] may have been involved in an aspect of the case involving the stolen securities. [8a, *infra.*]

The difficulty with this iffy assumption is two-fold. First, there was a complete lack of evidence to support such a finding. Secondly, and even more conclusively, the trial judge did not submit to the jury the question of petitioner's guilty knowledge concerning *stolen stocks.* The only issue of guilty knowledge which the judge submitted was the following:

> Ladies and Gentlemen of the jury, I instruct you that, before you can find the defendant Meretsky guilty of either Count One, conspiracy, or Count Nine, a substantive count, you must be satisfied beyond a reasonable doubt that he had knowledge that the Bethlehem Steel stock was counterfeit and not genuine.

The sole issue in determining petitioner's guilt was whether he knowingly dealt in counterfeit securities. This could have been fairly determined in a 4 or 5 day trial. Instead, he was saddled with trying to defend himself in a trial that lasted from the morning of March 22 until the afternoon of May 4. The vast majority of this lengthy trial dealt with the separate activities of Cimini and Pagoto and their fraudulent loans and dealings in Detroit, Boston, New York and environs.

> The principal and inevitable prejudice, however, was caused by the slow but inexorable accumulation of evidence of fraudulent practices by Shuck's co-

> defendants Kelly and Hagan . . . That some of this rubbed off on Shuck we cannot doubt.
>
> *United States vs. Kelly*, 349 F 2d 720, 759 (CA 2, 1965.)

The three Supreme Court decisions in this area of severance are *Berger vs. United States,* 295 US 78 (1935); *Kotteakos vs. United States*, 328 US 750 (1946); and *Schaffer vs. United States,* 362 US 511 (1960). In each of these cases application of the harmless-error statute was involved.[12]

Other Circuits have been particularly sensitive to the implications of these three cases in trials where the government has been unable to prove a prolix conspiracy charge carefully drafted to gather in the maximum number of defendants and to obtain the maximum procedural advantages of a broad conspiracy charge. *Kelly, supra; United States vs. Varelli,* 407 F 2d 735 (CA 7, 1969); *United States vs. Goss,* 329 F 2d 180 (CA 4, 1964); *Rocha vs. United States,* 288 F 2d 545, (CA 9, 1961). Not once has the Sixth Circuit in the past quarter of a century reversed a conviction because of a denial of severance. In every case where the issue was raised before the Court, the ruling was without rationale, and a simple statement that the matter of severance is discretionary with the trial

judge. See, for example, the decision below and *United States vs. Branan,* 457 F. 2d 1062, at 1066.[13]

Since it has been fifteen years since the Court has spoken on this question and since such an eminent authority as Professor Wright is critical of the performance of the lower courts generally on Rule 14 severance, we respectfully suggest that it is time for the Court to consider the issue again.

III.

LIMITING INSTRUCTIONS SHOULD HAVE BEEN GIVEN DURING THE TRIAL WHEN REQUESTED.

This Court has consistently held that in a conspiracy trial hearsay evidence admitted as to some of the defendants only must be carefully limited at the time the evidence is received. It is not enough to give an instruction at the close of the case. *Lutwak vs. United States,* 344 US 604, 618-619, (1953); *Delli Paoli vs. United States*, 352 US 232, 238 (1957).[14] Despite such plain commands of fairness, the trial judge refused to give any limiting instructions during trial. Likewise, we fail to find any Sixth Circuit cases implementing *Lutwak* and *Delli Paoli.*

The instruction petitioner requested was little enough protection[15] but he was entitled to it. It has been our long-

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[13] In only one case that we have been able to find has the Court given any extended analysis to the question of severance. *United States v Vida*, 370 F 2d 759 (1966). There the question was not briefed and, consistent with every other decision of the Sixth Circuit, the Court found no prejudicial error.

[14] Overruled on other grounds, *Bruton v United States*, 391 US 123.

[15] In *Bruton v United States*, 391 US 123, it was held that even carefully drafted limiting instructions would not overcome the prejudice of certain types of admissions of codefendants.

standing belief that one of the sillier rules of law that our profession indulges in is the notion that, once proof of participation in a conspiracy by a defendant is established, the jury is to be instructed that hearsay statements of co-conspirators are admissible against that defendant. What is the point of such an instruction? Once a person steps on the conspiracy trolley car, to use a favorite prosecutor's analogy, he is guilty of conspiracy, no matter how soon or where he gets off the trolley car. We think that the better rule would be, to avoid confusing the jury, that they be instructed simply that hearsay statements, admissible as to some defendants, are not to be considered in assessing the guilt of other defendants against whom the statement is incompetent.

Of course, we do not propose discarding the rules of criminal agency. Once a defendant's participation in a conspiracy is established, he should be held bound by the acts and statements of his co-conspirators. But, since the jury has no real need for such statements in assessing guilt, those statements should be used only by the trial judge in ruling on questions of law, *e.g.*, fixing the scope and duration of the conspiracy to rule on a question of severance or whether the statute of limitations has run.

If Certiorari is granted, we will urge adoption of this principle as a sound and necessary addition to conspiracy law. Such a rule would do away with at least some of the difficult mental gymnastics now required of jurors in conspiracy trials.

IV.

PETITIONER DID NOT RECEIVE A FAIR HEARING IN THE COURT OF APPEALS.

We have two complaints about the manner in which the Court of Appeals treated this case.[16] Each deserves consideration by this Court.

First, we were effectively denied a reasonable opportunity for oral argument. After petitioner's brief was filed, the government's motion to consolidate the three appeals was granted.[17] The Court limited argument to twenty minutes which gave petitioner, as one of three appellants, approximately six minutes and forty seconds to argue his eight points—fifty seconds a point. Two weeks before the hearing we pointed this out to the Court in a vain request for additional time for oral argument or advice from the Court as to which of the eight points it did not wish to hear oral argument.

If this were not enough, we had to confer two-thirds of the time to a nonlawyer who devoted his entire time to matters which were of no concern to us. We frankly think it incredible that the Court of Appeals would deny our motion for reargument under the circumstances.[18]

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[16] Not counting the final result.

[17] It smacks of unfairness for the government to wait until it has seen the issues and arguments raised by one appellant before seeking to consolidate appeals which really did not have common issues. It enabled the government to delay its filing and submit a single brief which successfully ignored most of the issues upon which *our* appeal was based.

[18] Even more incredible is the decision of the Court to deny the Ciminis a rehearing, but that issue is not before the Court because apparently Mr. Brown has decided not to petition for Certiorari on behalf of his "clients".

The Commission on Revision of the Federal Court Appellate System issued a preliminary report in April, 1975. Its recommendations to Congress included "establishment of minimum national standards relating to oral argument and written opinion", p. 55. A questionnaire soliciting views concerning the importance of oral argument and opinion writing was mailed to a sample of one thousand attorneys of record in cases filed in the Second, Fifth and Sixth Circuits. The rate of return was sixty percent, *id*, p. 57. The Commission found, at p. 67:

> An impressive 90 percent of the attorneys in each of the three Circuits agreed that judges are better able to avoid erroneous interpretations of the facts or issues in the case if they can direct questions to counsel, and that oral argument permits the attorney to address himself to those issues *which the judges believe* are crucial to the case [emphasis supplied].

It is only fair that, if the Court denies full time for oral argument in a case where several issues are raised, it advise counsel (upon request, as here?) on which of the issues it is interested in hearing oral argument.

Proposed legislation in this area is inappropriate. This Court, rather than Congress, is in the better position in the exercise of its supervisory power to regulate the procedures so vitally affecting the integrity of the appellate process. This case presents the Court with an opportunity to consider the problem, to invite *amicus curiae* briefs from persons more qualified than petitioner's counsel and to fully canvass this problem for which there is urgent need for solution.

Our second complaint relates to the failure of the Court of Appeals to give any reasoning for its decision. Again, referring to the Commission Report, p. 69:

> The most dramatic evidence of the importance which attorneys attach to a written record of the reason for a decision can be found in the view expressed by more than two-thirds of the attorneys surveyed that the due process clause of the Constitution should be held to require courts of appeals to write "at least a brief statement of the reasons for their decisions".

This overwhelming weight of legal opinion should not be ignored. Cf. *Winship, supra*, 397 US at 361, 362.[19]

An unreasoned appellate opinion is unfair to the litigant because it gives no assurance to him that the Court has given full consideration to his claims for justice. It is unfair to this Court, in the event that further review is sought, because the Court does not have the benefit of the reasoning of the Court below. It does not know whether the challenged result comes from a misinterpretation of the record or adherence to erroneous legal principles. Only the latter should command the attention of this Court.

Once before, this Court spoke of the failure of a Court of Appeals to give reasoning for its decision. In *Will vs. United States*, 389 US 90, 107, the Court vacated a judgment of the Seventh Circuit which issued a Writ of Mandamus without opinion. In doing so, it said:

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[19] Although virtually unanimous adherence to the reasonable-doubt standard in common law jurisdictions may not conclusively establish it as a requirement of due process, such adherence does "reflect a profound judgment about the way in which law should be enforced and justice administered."

> . . . we fail to see how [the corrective and didactic function of the Court of Appeals] can be served here without findings of fact by the issuing court and some statement of the court's legal reasoning. A mandamus from the blue without rationale is tantamount to an abdication of the very expository and supervisory functions of an appellate court upon which the government rests its attempt to justify the action below.

The eight questions we tendered to the Court of Appeals were substantial, not frivolous, Appendix "F", *infra*. We have already noted in fn. 12, *supra*, that one of them was expressly reserved in *Kotteakos*. This Court would not expressly reserve decision on a frivolous question.

The Court refused to discuss our claim that it was error to charge that proof of the accomplishment of the objective of a conspiracy would be persuasive evidence of the existence of the conspiracy. The twisted logic of the instruction would appeal to Jim Garrison, the New Orleans prosecutor who believed that, since Lee Oswald assassinated President Kennedy, there must have been a conspiracy to assassinate President Kennedy. The government cited no cases in either of the lower courts to support the instruction. There must be an intent to conspire, whether or not the substantive offense is committed. See *United States vs. Crimmins*, 123 F 2d 271, 273 (CA 2, 1941); *Tinsley vs. United States*, 43 F 2d 890, 892 (CA 8, 1930); *Mackreth vs. United States*, 103 F 2d 495 (CA 5, 1939); *United States vs. Aviles*, 274 F 2d 179, 189 (CA 2, 1960; *United States vs. Varelli*, 407 F 2d 735 (CA 7, 1969); and finally *Pinkerton vs. United States*, 328 US 640, 647-48 (1946). This instruction was extremely prejudicial to Meretsky since he conceded that he made the trip

to Florida with the stock and that he had previously handled the stock certificates.

The instruction that an offer of sale of securities considerably below market price indicates knowledge of illegality also was highly prejudicial. Such language is approved in *United States vs. Brawer*, 482 F 2d 117 (CA 2, 1973), but there the instruction contained additional important language that the inference was justified only with reference to a person the jury would find was familiar with any unusual discount being offered. That important qualification was not included in the trial instructions here to a jury considering the guilt or innocence of a freshman lawyer who was not shown to be a sophisticated investor.

The foregoing shows that at least some of our questions had substance. We could go on, but this Petition is already too long. We have reserved these questions in our Petition without arguing them as reasons for granting the Writ. But they may be needed by the Court to demonstrate the substance of our argument in the lower court.

RELIEF REQUESTED

For the foregoing reasons petitioner prays that his Petition for Certiorari be granted either for plenary review of the questions tendered or in the alternative to vacate the judgment and remand the case to the Court of Appeals for reargument and decision in reasoned opinion on each of the issues raised.

Respectfully submitted,

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Dated: Detroit, Michigan
June 12, 1975

APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

United States of America, Plaintiff, vs. Anthony J. Cimini, Daniel E. Cimini and Ross B. Meretsky, Defendants.	Criminal Action No. 47704

SUPPLEMENTAL MEMORANDUM OPINION DENYING MOTION FOR A NEW TRIAL

In addition to a bench opinion which was dictated upon the conclusion of the hearing of arguments on defendant Meretsky's motion for a new trial, this supplemental written opinion is filed. In the bench opinion concern was largely had with defendant Meretsky's motion as it related to Agent Wicklund's 302 report. The supplemental written opinion follows:

Ross Meretsky was convicted by a jury of conspiracy to pledge stolen and counterfeit securities in violation of 18 U.S.C. §§ 2314-15, and of transporting counterfeit securities in violation of 18 U.S.C. § 2314. He now moves for a new trial pursuant to Fed. R. Crim. P. 33, which provides in part: "The court on motion of a defendant may grant a new trial to him if required in the interest of justice".

Any error which could be raised on appeal may be raised in a motion for new trial, but the same requirement that

timely objections have been made whenever possible (Rule 51) and the doctrines of harmless error and plain error (Rule 52) must also be applied by the district court in considering such motions. *See* 8A J. Moore, Federal Practice ¶ 33.02[1], at 33-4 (2d ed. 1973). The command of Fed. R. Crim. P. 52(a) is particularly important: "Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded". The standards of harmlessness vary according to the nature of the error involved. As noted in *United States v. Panczko,* 429 F.2d 683, 686 n.6 (7th Cir. 1970), where the error is not of constitutional dimension, the test is that set out by the Supreme Court in *Kotteakos v. United States,* 328 U.S. 750, 764-65 (1946):

> "If, when all is said and done, the conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand . . . But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error, itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand."

See also Bihn v. United States, 328 U.S. 633, 638 (1946). However, "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt". *Chapman v. California,* 386 U.S. 18, 24 (1964). *See also Harrington v. California,* 395 U.S. 250 (1969). Although the latter test requires a higher level of persuasion of harmlessness, the substance of the harm remains the same. The question is not whether there is independent evidence in the record to support the conviction, but "whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction". *Fahy v. Connecticut,* 375 U.S. 85, 86-87 (1963). *See United States v. Evans,* 438 F.2d 162, 173-74 (D.C. Cir. 1971) (Bazelon, C.J., dissenting). Of course in certain cases such as effect may be presumed as a matter of course, for "there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error . . ." *Chapman v. California, supra,* 386 U.S. at 23. No such error appears in this record, however.

Defendant contends that the testimony of Agent Wicklund may have been false and misleading, and that if a hearing confirms this, a new trial must be ordered. The best answer to this argument is that even if the defendant's assertions concerning the newly discovered, impeaching evidence are accepted at face value, they are not inconsistent with Agent Wicklund's testimony. He testified that after his interview with Meretsky he transcribed his notes and destroyed the originals. When pressed to explain his distruction of the original notes he first stated that FBI rules require transcription within five working days, that he hesitated to say that "we could never keep out notes—but certainly, it is not a practice that we do keep them", and that this practice or policy was probably set by the agency's legal department in Washington. Then, when asked if it was promulgated in the form of a written directive he replied: "I would think that it would be, yes." Finally, when asked if he had ever seen that directive, he answered with a qualified affirmative: I would have

to go from—I would say that I have read some type of directive along that line over my past years of service". Yet to contradict this testimony, the defendant asserts only that the procedural manual of the FBI does not in any way support the practice of destroying original notes. That was never controverted by Wicklund, and indeed appears to be entirely consistent with his distinction between the rules which specify transcription and the directive concerning the practice of destroying original notes. Certainly, if the government had knowingly used false testimony or failed to correct it once introduced, this would constitute a violation of due process and be grounds for reversal. *See Miller v. Pate,* 386 U.S. 1 (1967); *Alcorta v. Texas,* 355 U.S. 28 (1957); *Pyle v. Kansas,* 317 U.S. 213 (1942); *Mooney v. Holohan,* 294 U.S. 103 (1935). This is true even though the false testimony goes only to the credibility of a witness. *Napue v. Illinois,* 360 U.S. 264 (1959). However, there is no violation unless the newly discovered or previously withheld evidence is sufficient to persuade the court that the testimony was in fact false. *Moore v. Illinois,* 408 U.S. 786, 797-98 (1972). Further, both *Moore* and *Napue* opinions contain language indicating that the Court had considered the materiality of the claimed falsehood. In *Napue* the conviction was reversed because "our own evaluation of the record here compels us to hold that the false testimony used by the State in securing the conviction of petitioner may have had an effect on the outcome of the trial". 360 U.S. at 272. And in *Moore,* even the partially dissenting opinion of Mr. Justice Marshall observed with respect to the prosecution's failure to disclose evidence allegedly inconsistent with the testimony of one of its primary witnesses: "Had this been the prosecution's only error, I would join the Court in finding the evidence to be immaterial". 408 U.S. at 807. False statements as

to collateral matters may well be harmless beyond a reasonable doubt. Thus, even though the government may be aware of the falsehood, and thus violate due process, such errors do not necessarily affect "rights so basic to a fair trial that their infraction can never be treated as harmless error". Such an argument is especially persuasive when it is remembered that the *Napue* principle is merely a variation of the basic due process rule of disclosure of exculpatory evidence most prominently identified with *Brady v. Maryland,* 373 U.S. 83 (1963), and the *Brady* rule explicitly contains a condition of materiality. 373 U.S. at 87; *Moore, supra,* 408 U.S. at 794-95. Finally, the granting of a new trial based on newly discovered evidence has traditionally been conditioned on a showing of materiality. *See* 8A Moore, Federal Practice, *supra,* ¶ 33.04. Although where deliberate prosecutorial misconduct is shown the showing of materiality required may be fairly low [*United States v. Keogh,* 391 F.2d 138, 147 (2d Cir. 1968)], "[t]he discovery of new evidence which merely discredits a government witness and does not directly contradict the government's case ordinarily does not justify the grant of a new trial. *Mesarosh v. United States,* 352 U.S. 1, 9 (1956); *United States v. Bolden,* 355 F.2d 453, 461 (7th Cir. 1965); *United States v. Switzer,* 252 F.2d 139, 145-46 (2d Cir. 1958); *United States v. Brewster,* 231 F.2d 213, 216 (2d Cir. 1956)." *United States v. Aguillar,* 387 F.2d 625, 626 (2d Cir. 1967). Here the alleged misstatement is immaterial because substantially all of Wicklund's testimony affecting Meretsky was embodied in his report of his interview with Meretsky, and Meretsky, when questioned as to the accuracy of that report, disagreed with it in only two particulars so minor that it seems accurate to say that the defendant corroborated every relevant aspect of Wicklund's testimony. In view of this corrobor-

action Wicklund's credibility was not in issue and any alleged misstatement as to a collateral matter is clearly harmless.

A reading of Wicklund's testimony principally at pages 1607, 1608 and 1609 of the transcript and Meretsky's testimony with regard to what he told Wicklund at pages 2101 and 2102 is revealing.

Defendant also claims error in the admission of the document containing Wicklund's interview report because of the destruction of the original notes. For the reasons noted above, this was not a violation of due process. Because the notes were not a verbatim transcript of the interview and because there is no indication of their deliberate, bad faith suppression, the failure to produce them is not a Jencks Act violation. *Compare United States v. Lonardo,* 350 F.2d 523 (6th Cir. 1965), *with United States v. Stephens,* Nos. 73-1334 to 1337 (6th Cir., filed Feb. 28, 1974); *United States v. Lane,* 479 F.2d 1134 (6th Cir. 1973); *United States v. Fruchtman,* 421 F.2d 1019 (6th Cir. 1970), *cert. denied,* 400 U.S. 849 (1970); *and United States v. Hensley,* 374 F.2d 341 (6th Cir. 1967), *cert. denied,* 388 U.S. 923 (1967). *See also United States v. Augenblick,* 393 U.S. 348 (1969); *Killian v. United States,* 368 U.S. 231 (1961); *United States v. Ternell,* 474 F.2d 872 (2d Cir. 1973).

Before being offered into evidence, the 302 report was read into the record verbatim by its author, Agent Wicklund, without objection by defendant Meretsky. Although the report itself was not offered as evidence until somewhat later, its initial reading appears to have been treated by the parties and the court as the submission of past recollection recorded. Admittedly the rules of evidence favor production of the original recording *if available.*

3 J. Wigmore, Evidence § 749 (Chadbourn rev. 1970). The preference is easily overcome, however, and copies are freely substituted whenever the original has been destroyed or is otherwise unavailable. *Id.;* C. McCormick, Evidence § 301 (2d ed. 1972). The defendant may also be held to have waived any objection to the later introduction of the report itself by having failed to object to its initial reading into evidence. The majority rule is that the record which embodies the past recollection is itself admissible. *See* Annot., 82 A.L.R.2d 473, 537-46 (1962). *But see* Proposed Fed. R. Evid. 803(5). The admission of the agent's testimony as to the record itself in the absence of the original notes was not plain error under Rule 52, and therefore under Rule 51 the defendant, by failing to object to that testimony, waived his right to object at a later point to the admission of the record itself, which was effectively approved at the time it was first read to the jury.

The defendant also argues that even if this court's denial of pre-trial motions for severance was correct, the evidence revealed two separate conspiracies rather than the one charged in the indictment, and this permitted the jury to hear much evidence which was prejudicial to Meretsky even though irrelevant to the conspiracy in which he allegedly participated. The evidence does not support such a construction. Defendant claims there were two conspiracies—one relating to stolen securities, the other to counterfeit securities. Such a division is totally artificial, based more on a distinction between the means adopted by the conspirators to effectuate their purposes than on evidence of qualitatively separate agreements. Just as a conspiracy to distribute a variety of drugs is not factually separable into distinct conspiracies dealing with each kind of drug, even though certain members may have dealt

in only one variety, so the conspiracy proven in this case was a single, integrated concert of action for the purpose of disposing of illegal securities, whether counterfeit or stolen. The fact that Meretsky never became personally involved with the stolen securities is irrelevant. *Pinkerton v. United States,* 328 U.S. 640 (1946). There is no duplicity, for a single conspiracy may contemplate the commission of more than one substantive offense. *Braverman v. United States,* 317 U.S. 49 (1942). "The conspiracy is the crime, and that is one, however diverse its objects." *Frohwerk v. United States,* 249 U.S. 204, 210 (1919). The conclusion of the Supreme Court in *Blumenthal v. United States,* 332 U.S. 539 (1947), is equally applicable here:

> "All by reason of their knowledge of the plan's general scope, if not its exact limits, sought a common end, to aid in disposing of the whiskey. True each salesman aided in selling only his part. But he knew the lot to be sold was larger and thus that he was aiding in a larger plan. He thus became a party to it . . ." 332 U.S. at 559.

A reading of the record will reveal that it is vital whose testimony the jury accepted. If, as seems evident from the verdict, the jury accepted the testimony of witness Pagoto, the jury might well have concluded that Meretsky may have been involved in an aspect of the case involving the stolen securities. It is interesting also to note that in his original statement to Agent Wicklund Meretsky says that he did not mention the name of Mr. Cimini at any time (transcript, page 2101). Yet at the trial Meretsky did make this correction. Much of this aspect of the case dealing with involvement in the conspiracy as it relates to the disposition of the stolen securities depends on the credibility of the witnesses.

Finally, even if one were to conclude that two conspiracies rather than one were shown, the facts in this case are so like those in *Berger v. United States,* 295 U.S. 78 (1935), that an identical conclusion is warranted—the variance was not prejudicial and did not affect any of the defendant's substantial rights. 295 U.S. at 82-83.

Defendant also objects to the following jury instruction:

> "On the other hand, proof concerning the accomplishment of the objectives of a conspiracy may be persuasive evidence of the existence of the conspiracy itself. To simplify this perhaps a bit more, success of the venture, if you believe it was successful, is the best proof of the venture or the agreement."

This instruction is merely a variation on the well settled principle that a conspiracy "may be proved by circumstantial evidence, and that the overt acts performed by the parties to effectuate the object of the illegal agreement may be considered in determining whether the conspiracy existed". *Pastrano v. United States,* 127 F.2d 43, 45 (4th Cir. 1942). *See, e.q., United States v. Nowak,* 448 F.2d 134, 140 (7th Cir. 1971). "[P]roof of concert of action in the commission of an unlawful act from which a plan, common design or an agreement can be inferred" [*United States v. Zuideveld,* 316 F.2d 873, 878 (7th Cir. 1963)] is an entirely proper means of demonstrating the conspiracy's existence. "[A] common purpose and plan may be inferred from a 'development and a collocation of circumstances'." *Glasser v. United States,* 315 U.S. 60, 80 (1942). This usually involves "acts of the persons accused, which are done in pursuance of an apparent criminal purpose". *United States v. Levinson,* 405 F.2d 971, 986 (6th Cir. 1968); *United States v. Luxenberg,* 374 F.2d 241, 250 (6th Cir. 1967). That the efforts are successful is

certainly the best proof of the end which the combination sought to attain. Just as participation in "the very illegal act contemplated by the agreement" is persuasive evidence of the actor's adherence to the agreement itself [*Scales v. United States,* 367 U.S. 203, 234 (1961); *United States v. Spock,* 416 F.2d 165, 173 (1st Cir. 1969)], so the effectuation of the alleged conspiratorial objective may be persuasive evidence of an antecedent agreement to pursue that goal, at least where the objective is such as would commonly entail concerted activity for its attainment. A successful condition of actions by alleged conspirators is a proper basis from which a preexisting coordination of purpose may be inferred. Although the element of coordination was not stressed in the quoted passage, the remainder of the instructions clearly indicate its necessity. Thus the instruction, taken in the context of the surrounding instructions and the facts of this case, indicates only that the jury was to consider the acts and events which the government claimed were in furtherance of the conspiracy as evidence of a possible antecedent common design. That they were alleged not only to have furthered but to have consummated the conspiratorial design is a difference of degree, without significance as to the propriety of the type of inference permitted thereunder. The cases cited by defendant hold only that proof of a substantive offense is not per se proof of a conspiracy to commit that offense. That is undenied. It may, however, have some, perhaps considerable probative value if its particulars and the surrounding events suggest that it followed from an agreement, and that is the limit of both the instruction and this holding.

The remainder of defendant's contentions relating to grand jury testimony, severance, due process, and other jury instructions merely restate objections previously argued and decided. They have not gained in persuasiveness

through the passage of time and are again denied. The motion for a new trial, both as originally filed and as supplemented, does not demonstrate that a new trial is required "in the interests of justice". Neither specific error nor generalized injustice are present, and the motion must therefore be denied.

An appropriate order may be submitted.

By: /s/ John Feikens
United States District Judge

Dated: Detroit, Michigan
March 28, 1974

APPENDIX B

ORDER

(Filed March 17, 1975)

United States of America, Plaintiff-Appellee, v. Anthony J. Cimini, Daniel E. Cimini, and Ross B. Meretsky Defendants-Appellants.	Nos. 74-1657, 74-1658, 74-1659

Before: Celebrezze, Miller and Engel, Circuit Judges.

Appellants appeal their Judgments of conviction after a jury trial.

It appears that the evidence against Anthony Cimini, Daniel E. Cimini, and Ross B. Meretsky under count one of the indictment, charging conspiracy in violation of 18 U.S.C. §§ 2314-2315, was sufficient to warrant the submission of the case to the jury. In this Circuit, "circumstantial evidence alone can sustain a guilty verdict and . . . to do so, circumstantial evidence need not remove every reasonable hypothesis except that of guilt." *United States v. Scales,* 464 F.2d 371 (6th Cir. 1972). The convictions of Daniel E. Cimini under counts 2, 3, 4, 5, 6, 8, and 9 of the indictment and of Ross B. Meretsky under count 9 likewise appear to be supported by the evidence.

The District Court's response to a question from the jury during its deliberations was a correct statement of the law and did not infringe Appellants' Fifth or Sixth Amendment rights. The District Court's denial of Ap-

pellant Meretsky's motion for severance was within its discretion under Rule 8, F. R. Crim. P. We find no abuse thereof.

Upon consideration of the briefs, the record, and oral argument, finding no error in the jury instructions, and no ground appearing which requires reversal of the convictions, the Judgments of conviction should be, and they hereby are, Affirmed.

ENTERED BY ORDER OF THE COURT
By: /s/ John P. Hehman,
Clerk

APPENDIX C

ORDER

(United States Court of Appeals—Sixth Circuit)

(Filed May 13, 1975)

United States of America, Plaintiff-Appellee, v. Ross B. Meretsky, Defendant-Appellant.	No. 74-1659

Before: Celebrezze, Miller and Engel, Circuit Judges.

Appellant having filed a petition for rehearing en banc and no judge of the Court having requested a rehearing en banc, the motion has been referred to the panel which heard the original appeal. The Court has considered the petition for rehearing and concludes that no issues are raised therein which were not considered upon the original submission.

The Court being advised, it is ORDERED that petition be, and it hereby is, denied.

ENTERED BY ORDER OF THE COURT
By: /s/ John P. Hehman,
Clerk

APPENDIX D

INDICTMENT

The Grand Jury Charges:

Count One

1. That from on or about June 1, 1969, and continuously thereafter, up to and including November 1, 1970, in the Eastern District of Michigan, and elsewhere, the defendants, Anthony J. Cimini, Daniel E. Cimini, Samuel Caruso, Ross Meretsky, and unindicted co-conspirators, Warren Ellington, Russell Brinkley, Harold Peterson, Paul Leggio, and Joseph Pagoto, unlawfully, willfully and knowingly did combine, conspire, confederate, and agree together and with each other, and with divers other persons whose names are to the grand jury unknown, to commit offenses against the United States; that is, to violate Title 18, United States Code, Sections 2314 and 2315 by receiving, concealing, disposing of, and pledging for loans, securties of a value exceeding five thousand dollars ($5,000.00) moving as, and which were a part of and which constituted interstate commerce, knowing the same to have been stolen, unlawfully converted and taken; receiving, concealing, disposing of and pledging as security for loans, falsely made, forged, altered and counterfeited securities moving as and which were a part of and which constituted interstate commerce, knowing the same to have been so falsely made, forged, altered, and counterfeited; by transporting and causing to be transported in interstate commerce, with unlawful and fraudulent intent, falsely made and counterfeited securities knowing the same to have been falsely made and counterfeited.

2. It was a part of said conspiracy that the defendant Daniel E. Cimini would obtain possession of securities which had been stolen, knowing the same to have been stolen.

3. It was a further part of said conspiracy that the defendants Daniel E. Cimini, Ross B. Meretsky, and Joseph Pagoto, an unindicted co-conspirator, would pledge and cause to be pledged, securities of a value exceeding five thousand dollars ($5,000.00) to a bank, knowing the same to have been stolen.

4. It was a further part of said conspiracy that the defendant Anthony J. Cimini would obtain a Bethlehem Steel Corporation stock certificate.

5. It was a further part of said conspiracy that the defendants Samuel Caruso and Anthony J. Cimini, together with Paul Leggio, an unindicted co-conspirator and other unknown person or persons, would employ printers who would print counterfeit certificates of Bethlehem Steel Corporation stock.

6. It was a further part of said conspiracy that the defendants Anthony J. Cimini, Daniel E. Cimini, and Joseph Pagoto, an unindicted co-conspirator, would pledge counterfeit Bethlehem Steel Corporation stock as security for bank loans.

7. It was a further part of said conspiracy that the defendant Daniel E. Cimini would transport and cause to be transported in interstate commerce, counterfeited securities and securities which had been stolen from the Eastern District of Michigan, to the District of Massachusetts, and to the Southern District of New York.

8. It was a further part of said conspiracy that the defendants Daniel E. Cimini, Ross B. Meretsky, and Joseph Pagoto, an unindicted co-conspirator, would transport from Detroit, Michigan, to Florida, counterfeit Bethlehem Steel Corporation stock certificates for the purpose of using them as collateral for bank loans in Florida.

Overt Acts

In furtherance of the aforesaid conspiracy and to effect the objects thereof, the following overt acts, among others, were committed in the Eastern District of Michigan and elsewhere:

1. On or about July 17, 1969, the defendant Ross B. Meretsky had a conversation with Joseph Pagoto.

2. On or about July 17, 1969, the defendant Daniel E. Cimini had a conversation with Joseph Pagoto.

3. On or about July 31, 1969, Daniel E. Cimini and Joseph Pagoto pledged securities to the City National Bank at Detroit, Michigan, for a loan.

4. On or about November 15, 1969, the defendant Samuel Caruso had a conversation with Warren Ellington.

5. On or about December 1, 1969, the defendant Samual Caruso paid Warren Ellington five hundred dollars ($500.00) and received approximately 400 certificates, 100 shares each, of counterfeit Bethlehem Steel Corporation stock.

6. On or about December 15, 1969, the defendant Daniel E. Cimini transported and caused to be transported securties from the Eastern District of Michigan to the Southern District of New York, knowing the same to have been stolen, unlawfully converted and taken.

7. On or about December 15, 1969, the defendant Daniel E. Cimini rented a safety deposit box at the First National City Bank in New York, New York.

8. On or about December 24, 1969, the defendant Daniel E. Cimini, in the Eastern District of Michigan, did deliver counterfeit Bethlehem Steel Corporation stock certificates to Joseph Pagoto, an unindicted co-conspirator.

9. On or about March 1, 1970, the defendant Daniel E. Cimini transported and caused to be transported, in interstate commerce, counterfeit securities from the Eastern District of Michigan to the District of Massachusetts, and to the Southern District of New York.

10. On or about July 20, 1970, the defendant Daniel E. Cimini and Joseph Pagoto, an unindicted co-conspirator, had a conversation relating to pledging stocks as security for a bank loan.

11. On or about September 10, 1970, the defendant Daniel E. Cimini and Joseph Pagoto sent 34 certificates 100 shares each, of counterfeit Bethlehem Steel Corporation stock from the Eastern District of Michigan to Florida.

12. On or about September 20, 1970, the defendants Ross B. Meretsky and Daniel E. Cimini, together with Joseph Pagoto, travelled from the Eastern District of Michigan, to Miami, Florida.

All in violation of Title 18, United States Code, Section 371.

The Grand Jury Further Charges:

Count Two

That on or about the 17th day of July 1969, the defendant Daniel E. Cimini, in the Eastern District of Michigan, did receive and dispose of, and cause to be disposed of, securities of a value exceeding five thousand dollars ($5,000.00) moving as, and which were a part of, and

which constituted interstate commerce, knowing the same to have been stolen, unlawfully converted and taken, to wit: securities in the street form name of Merrill Lynch, Pierce, Fenner and Smith, which were deposited in the United States Mail on or about April 24, 1969.

In violation of Title 18, United States Code, Section 2315.

The Grand Jury Further Charges:

Count Three

That on or about the 31st day of July 1969, in the Eastern District of Michigan, the defendant Daniel E. Cimini and Joseph Pagoto, an unindicted co-conspirator, did pledge and cause to be pledged as security for a loan, securities of a value exceeding five hundred dollars ($500.00) moving as, and which were a part of, and which constituted interstate commerce, knowing the same to have been stolen, unlawfully converted and taken, to wit: securities in the street form name of Merrill Lynch, Pierce, Fenner and Smith, which were deposited in the United States mail on or about April 24, 1969.

In violation of Title 18 United States Code, Sections 2315, and 2.

The Grand Jury Further Charges:

Count Four

That on or about December 15, 1969, the defendant Daniel E. Cimini did transport and cause to be transported in interstate commerce from the Eastern District of Michigan to the District of Massachusetts, securities of a value exceeding five thousand dollars ($5,000.00) knowing the

same to have been stolen, converted and taken by fraud, to wit: various stock certificates and bonds, which were deposited in the United States mail on or about April 24, 1969, October 10, 1969, and October 17, 1969.

In violation of Title 18 United States Code, Sections 2314 and 2.

The Grand Jury Further Charges:

Count Five

That on or about the 1st day of June 1970, the defendant Daniel E. Cimini, in the Eastern District of Michigan, did receive, conceal, store, barter and dispose of, securities of a value exceeding five thousand dollars ($5,000.00) moving as and which were a part of, and which constituted interstate commerce, knowing the same to have been stolen, unlawfully converted and taken, to wit: various stock certificates and bonds, which were deposited in the United States mail on or about April 24, 1969, October 10, 1969, and October 17, 1969.

In violation of Title 18, United States Code, Section 2315.

The Grand Jury Further Charges:

Count Six

That on or about the 23rd day of July 1970, in the Eastern District of Michigan, the defendant Daniel E. Cimini did knowingly make a materially false statement in an application for a loan submitted by Daniel E. Cimini on or about said date to the Richardian Federal Credit Union, Detroit, Michigan, a federal credit union, for the purpose of influencing the action of said credit union to approve said loan, in that Daniel E. Cimini stated and represented in said application that he owned 1,000 shares of Bethlehem Steel Corporation stock, when in truth and fact, as the defendant well knew, said stock was forged, altered, and counterfeited.

In violation of Title 18 United States Code, Section 1014.

The Grand Jury Further Charges:

Count Seven

That on or about the 28th day of July 1970, the defendant Anthony J. Cimini and Daniel E. Cimini did knowingly make and cause to be made, and aided and abetted in the making of a materially false statement and report in an application for a loan submitted by Joseph Pagoto, on said date, to the Detroit Bank and Trust Company, Detroit, Michigan, a bank, the deposits of which are insured by the Federal Deposit Insurance Corporation, for the purpose of influencing the action of said bank to approve said loan, in that the said defendants did cause to be represented in said statement and report that Joseph Pagoto owned 5,000 shares of Bethlehem Steel Corporation stock, when in truth and fact, as defendant well knew said stocks were counterfeit.

In violation of Title 18, United States Code, Sections 1014 and 2.

The Grand Jury further Charges:

Count Eight

That on or about September 10, 1970, the defendant Daniel E. Cimini did with unlawful and fraudulent intent transport and cause to be transported in interstate commerce from the Eastern District of Michigan to the Southern District of Florida, falsely made, altered, forged and counterfeited securities, knowing the same to have been falsely made, forged, altered and counterfeited, to wit: Bethlehem Steel Corporation stock certificates.

In violation of Title 18 United States Code, Sections 2314 and 2.

The Grand Jury Further Charges:

Count Nine

That on or about the 20th day of September 1970, the defendants Ross B. Meretsky and Daniel E. Cimini did with unlawful and fraudulent intent, transport and cause to be transported in interstate commerce from the Eastern District of Michigan to the Southern District of Florida, falsely made, forged, altered and counterfeited securities, knowing the same to have been falsely made, forged, altered and counterfeited, to wit: Bethlehem Steel Corporation stock certificates.

In violation of Title 18 United States Code, Sections 2314 and 2.

THIS IS A TRUE BILL

/s/ Fred D. Latter
Foreman

/s/ Ralph B. Guy, Jr.
United States Attorney

Dated: August 31, 1972.

APPENDIX E

SUMMARY OF TRIAL EVIDENCE

Pagoto was an unprosecuted co-conspirator who testified for the government. He built a home for the defendant Daniel Cimini in early 1969 and had not been paid in full. On July 15 he threatened Cimini with foreclosure of his lien. Later the same day, according to Pagoto, petitioner called him and said:

> Mr. Cimini intends to pay, but he has a different way to pay for the lien on the house. It isn't necessary to foreclose.*

Pagoto then called Cimini and arranged to meet him later that day in Cimini's office where Pagoto was given some negotiable stocks which had been stolen from an April 24, 1969 mail shipment from a Merrill-Lynch office in New York to its Detroit office (Similar shipments of negotiable stock on October 10 and October 17, 1969, also ended up in the hands of Cimini and Pagoto).

Thereafter, both Cimini and Pagoto used or attempted to use the stolen securities as collateral for loans. Pagoto's first loan on the strength of the stolen stock was in July, 1969, when he obtained $50,000 from a Detroit bank. In December, 1969, Cimini entered into negotiations with co-conspirators in Southbridge, Massachusetts, who used

---

* Petitioner denied making such a call or even knowing Pagoto until June, 1970. Pagoto's testimony on this point was somewhat impeached by that of the bank official who gave Mr. and Mrs. Cimini a mortgage on the house on April 10, 1969. Pagoto gave a formal waiver of lien and sworn statement of general contractor before the mortgage issued.

some of the stolen securities for fraudulent loans in that area. In January, 1970, one of the Southbridge conspirators sought to dispose of some of the securities through the Argentine contacts of a New York professional loan broker. Much of the trial evidence concerned the above dealings.

Around Christmas, 1969, a co-conspirator arranged with a Detroit printer to have eight or nine hundred Bethlehem Steel stock certificates counterfeited. They were of high quality, good enough to be "disturbing" to the American Bank Note Company officials and, according to the Assistant Treasurer of Bethlehem Steel Corporation, they would fool a rather sophisticated individual. In February, 1970, a Detroit bank loaned $75,000 to Pagoto who used counterfeit stock as collateral. In March 1970, Cimini gave two hundred counterfeit certificates to a co-conspirator in Southbridge. In May, 1970, Cimini pledged three hundred shares of counterfeit stock as additional collateral on a real estate loan.

In July, 1970, Pagoto got $50,000 on the Bethlehem stock from the Detroit Bank and Trust Company. An hour or two later Dan Cimini came in with Pagoto's check for $25,000 which he cashed at the bank. He used some of the proceeds to purchase a check for $3900, payable to petitioner, listing the purchaser as "T. Cimini" (presumably the defendant Anthony Cimini). Petitioner endorsed the check and delivered it to another attorney in payment of legal services on behalf of Anthony Cimini.

Petitioner was admitted to practice law in June, 1969, and until September worked for another lawyer doing personal injury work. He met Dan Cimini while investigating an accident involving a car owned by Cimini's leasing company. Cimini hired petitioner to do collection work

and later to handle the preliminary work on Cimini's divorce.

Except for the July, 1969, phone call to which Pagoto testified, the first evidence concerning petitioner's activities was of an event occurring June 11, 1970. Pagoto brought a couple of his letterheads to Cimini's office. Cimini telephoned petitioner, and petitioner then dictated a letter over the telephone to Cimini's secretary which read substantially:

> Please be advised that I am holding 28,900 shares of Bethlehem stock [listing the certificates].
>
> Further, be advised that I am hereby authorizing Ross B. Meretsky to transact a payment on behalf of the listed stock certificates with my consent and approval.
>
> And it is further understood that the stock is not to be disbursed for a period of six months.

The letter was signed by Pagoto.

The next day the stock was delivered to petitioner's office. The certificates, in Pagoto's name, were endorsed by him in blank. Petitioner was instructed to negotiate a loan on the stock and, if he were successful, he would obtain a substantial fee.

Petitioner called in a stock broker who, along with his superior officer, came across the street to petitioner's office to examine the stock. The stock brokers told petitioner that the stock was negotiable like cash and should be locked up in a vault or rendered non-negotiable. Petitioner immediately stamped his name on the backs of each certificate over Pagoto's signature.

Petitioner said he was instructed by Pagoto not to sell the stock for delivery before sixty days. When this was communicated to the stock broker, he discussed a discount of 2 to 3 points. One of the stock brokers said petitioner had asked for a 90-day delay in delivery and that the normal discount on such a transaction would be around 15 percent.

Petitioner then insisted that the broker contact the transfer agent to authenticate the stock. When advised that the transfer agent could not verify that the stock was registered to Pagoto, petitioner requested the broker to contact Bethlehem Steel directly. Bethlehem did not respond to the inquiry. Meanwhile, the broker declined to handle the transaction because he could not verify that the stock was registered in Pagoto's name.

On June 24, 1970, petitioner talked to a local banker about borrowing money on the Bethlehem stock. The banker requested a financial statement from the borrower, and petitioner communicated this to Pagoto. Pagoto said to forget about it because he had another loan, and four or five weeks later picked up the stock from petitioner.

In the last week of August, 1970, Pagoto flew to Florida to make preliminary arrangements for a half a million dollar bank loan, using the counterfeit Bethlehem stock. A week later, on September 3, Dan Cimini and Pagoto went to Florida together to complete the arrangements. Shortly thereafter, back in Detroit, Pagoto received telephone advice from Florida that the loan had been arranged, and he and Cimini agreed to go back to Florida on September 20.

A day or two before the trip Cimini called petitioner and asked him to go to Florida with them because petitioner's name was on the back of the certificates, and he would

have to execute an assignment. Petitioner agreed to go if it wouldn't take too long, and on Sunday, September 20, accompanied Cimini and Pagoto to Florida. Pagoto carried the stock.

The following day petitioner, Cimini, and Pagoto met with an accountant and a professional loan broker and later with the loan officers from two Florida banks. During these meetings questions arose about the stock and the disposition of dividends. Once Cimini and petitioner left the room to confer and returned in about five minutes with a response that Cimini was faced with a divorce action and did not want the stock in his name. Petitioner said his name was on the certificates in order to protect his client.

The Florida loans did not go through, and that afternoon, September 21, petitioner returned to Detroit alone, leaving Pagoto and Cimini in Miami. Three or four days later the F.B.I. entered the scene and began its investigations.

APPENDIX F

STATEMENT OF THE ISSUES

Raised in the Court of Appeals.

I.

Was the evidence sufficient to sustain the Defendant's conviction?

II.

Is a Defendant entitled to severance where

A. He is named in only two of nine counts and most of the evidence at trial was unrelated to the issue of Defendant's guilt, and

B. The evidence disclosed two or more conspiracies rather than the one charged and had the indictment conformed with the proofs, joinder would have been impermissible under Rule 8 FRCRP, and

C. Because of the joinder, Defendant was circumscribed in his proofs that he had no stake or interest in the conspiracy.

III.

Is a Defendant denied his right to be informed of the nature of the accusation against him and of his right to be proceeded against only on indictment of a Grand Jury, where he is charged with one conspiracy but the proofs at trial show him to be involved, if at all, in a substantially smaller subsidiary conspiracy?

IV.

Did the Trial Judge indicate his bias against the Defendant so that it, coupled with misconduct of the prosecutor, denied Defendant a fair trial?

V.

In a conspiracy trial involving multiple defendants, is the Defendant, upon his request, entitled to have the jury instructed at the time of the reception of hearsay evidence that such evidence shall not be admissible against the Defendant to prove his participation in the conspiracy?

VI.

Where guilty knowledge is an element of a crime, is the Defendant entitled to an instruction that the evidence of his guilty knowledge must be clear and unequivocal?

VII.

Is it error to instruct the jury that proof of the accomplishment of the objective of the conspiracy is persuasive evidence of the existence of the conspiracy?

VIII.

Is it error to instruct the jury that an offer of sale of securities considerably below market price indicates knowledge of illegality where

A. There is no evidence of such an offer of sale, or

B. The instruction fails to tell the jury that one must knowingly make such an offer in order for the inference to be justified?

No. 74-1562

In the Supreme Court of the United States

OCTOBER TERM, 1975

ROSS B. MERETSKY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,

RICHARD L. THORNBURGH,
Assistant Attorney General,

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OPINION BELOW

The opinion of the district court (Pet. App. A) is not reported. The order of the court of appeals (Pet. App. B) is unreported

JURISDICTION

The judgment of the court of appeals (Pet. App. B) was entered on March 17, 1975. A petition for rehearing was denied on May 13, 1975 (Pet. App. C). The petition for a writ of certiorari was filed on June 12, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the court of appeals applied a proper standard for testing the sufficiency of circumstantial evidence.

2. Whether the district court erred in denying severance.

3. Whether the district court erred in refusing to give a limiting instruction at the time co-conspirators' hearsay statements were introduced.

4. Whether the review by the court of appeals was adequate.

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Michigan, petitioner was convicted of conspiracy to pledge, dispose of, and transport counterfeit and stolen securities, in violation of 18 U.S.C. 371 and 2314-2315, and of transporting forged securities, in violation of 18 U.S.C. 2314. He was sentenced to concurrent three-year terms of imprisonment and fined $5,000. The court of appeals affirmed (Pet. App. B).

1. The government's evidence showed that in April 1969 Joseph Pagoto, a Detroit builder (and later an unindicted co-conspirator), completed construction of a house for co-defendant Daniel Cimini (Tr. 133).[1] Two months later, with $19,000 still owing from Cimini, Pagoto notified Cimini of his intent to foreclose on the lien securing payment. Cimini requested more time (Tr. 137). Several hours later petitioner, an attorney, telephoned Pagoto and told him that Cimini intended to pay his debt but "had a different way of doing it" (Tr. 139). At petitioner's suggestion, Pagoto again contacted Cimini, who offered to give him shares of

[1]We are lodging with the Clerk of this Court the nine-volume trial transcript ("Tr.") and the separately paginated transcript of the hearing on petitioner's motion for a new trial.

Co-defendants Anthony and Daniel Cimini were both convicted on the first count of the indictment, charging conspiracy. Daniel Cimini was also convicted on seven substantive counts. The court of appeals affirmed their convictions (Pet. App. B); they do not join this petition.

stock in various corporations, which Pagoto could keep for a year or two and use to secure bank loans; at the end of that period Cimini would pay the $19,000 and retrieve the certificates (Tr. 140-141). Pagoto agreed and thereafter used the securities, later determined to have been stolen while in transit between the New York and Detroit offices of a brokerage house (Tr. 66, 71, 76), as collateral for loans he obtained for himself and for Cimini (Tr. 159, 178-183). Until June 1970, Cimini attempted to use additional stolen securities as collateral for various business transactions in Michigan, Massachusetts, and New York (Tr. 221-240, 720, 821-824, 910-913).

2. In late October 1969, Cimini advised Pagoto that he had an unidentified wealthy client who was interested in financing several subdivisions Pagoto proposed to build (Tr. 212, 217). In December, Cimini gave Pagoto 200 consecutively numbered certificates of Bethlehem Steel Corporation stock, each representing 100 shares. Cimini explained that the shares were made out to Pagoto because his client had decided that all aspects of the real estate venture should be in Pagoto's name (Tr. 188-189). In January 1970, Cimini gave Pagoto another 200 certificates of Bethlehem Steel stock, numbered consecutively from the previous group, and told him to hold them for use in another proposed real estate transaction (Tr. 192-193). The certificates were later shown to be counterfeit (Tr. 494-616). Pagoto did not know this, however, and used some of them as collateral for additional bank loans (Tr. 190).

Several weeks later Cimini requested that Pagoto endorse and return all of the certificates, claiming that his client had decided to sell the stock (Tr. 193). Pagoto signed his name on the 350 certificates he had not pledged with lenders and returned them to Cimini (Tr. 194). In June 1970, Cimini asked Pagoto to give him

several of Pagoto's letterheads so that petitioner could negotiate the certificates (Tr. 242). Pagoto brought the stationery to Cimini's office. A telephone call was made to petitioner, who dictated to Cimini's secretary a power of attorney for Pagoto to sign authorizing petitioner to sell the stock (Tr. 245-246, 1047-1048).

Petitioner then attempted to sell the securities to a Detroit stock broker. The broker and his supervisor went to petitioner's office, where they were shown a large number of the Bethlehem Steel shares that Pagoto had endorsed. The brokers told petitioner that the endorsed shares were negotiable and that for his protection petitioner should obtain a power of attorney and store the stock in a safe (Tr. 1063, 1118). Thereupon petitioner stamped his name on a line on each certificate, assigning himself power of attorney (Tr. 1064). Petitioner also told the brokers that his client would give a discount of $150,000 on the sale of the stock (which appeared to be worth approximately one million dollars), but that delivery to buyers would have to be delayed for ninety days (Tr. 1065, 1120, 1127). The amount of the discount and the extent of the delay were unusual (Tr. 1126, 1526-1527). The proposed sale was aborted when the brokers called a transfer agent in New York and were advised that no Bethlehem Steel securities were registered in the name of Joseph Pagoto (Tr. 1056, 1125).

Petitioner then attempted to obtain a $100,000 bank loan for an unidentified client, using some of the shares as collateral. The bank refused to make the loan because petitioner would not provide the name of his client, the purpose of the loan, or the manner in which it would be repaid. Petitioner had told a bank officer that this information was unnecessary given the large amount of collateral offered (Tr. 1395-1398).

3. In early September 1970, Pagoto, still in need of operating funds for building ventures, asked Kent Tomlinson, a Florida businessman and friend of Pagoto's, whether he knew anyone willing to make a $500,000 loan secured by Bethlehem Steel stock (Tr. 256). Tomlinson said that he did, whereupon Pagoto and Cimini went to Florida and were introduced by Tomlinson to Glenn Partins, a banker, who told them that Tomlinson had an outstanding loan of his own that was in jeopardy because the collateral used to secure it had lost value (Tr. 260). Cimini and Pagoto agreed to assist Tomlinson by giving him some of the Bethlehem Steel shares. Petitioner prepared an agreement, the terms of which prohibited Tomlinson from selling the stock or using it in other transactions (Tr. 263). On September 10, 1970, Pagoto sent certificates representing 3,400 shares of Bethlehem Steel to Tomlinson, who in turn gave them to Partins (Tr. 1204-1205).

On September 20, 1970, Pagoto and Cimini went to Florida again, this time with petitioner, on news from Tomlinson of tentative arrangements for two $100,000 loans for Pagoto (Tr. 283). They brought with them a number of the counterfeit securities and met with several potential lenders, but they were unsuccessful in obtaining the loans. On two occasions questions arose about the stock; Cimini and petitioner left the meeting room to confer before responding (Tr. 1328-1330). Petitioner several times told the prospective lenders that the stock was in Pagoto's name because Cimini, the true owner, was faced with a divorce action and did not want the stock in his name (Tr. 1330). Petitioner explained that his own name appeared on the certificates as Pagoto's endorsee so that his client, Cimini, would be protected (Tr. 1330).

4. During a routine inquiry of Partins' bank, it was discovered that the Bethlehem Steel shares furnished by Tomlinson were counterfeit (Tr. 1475-1503, 1509).

The ensuing FBI investigation led to the discovery of the other counterfeit and stolen securities used in various transactions by Pagoto and Cimini (Tr. 109-116).

ARGUMENT

1. Petitioner's assertion that in criminal cases the Fifth and Tenth Circuits apply a test for evaluating the sufficiency of the evidence different from the test used in the other circuits, notably the Sixth, is not accurate.[2] The Fifth Circuit has explained that, notwithstanding "verbalistic" differences, "we are in agreement with our brothers in other circuits that whether the evidence be direct or circumstantial, the matter of the defendant's guilt is for the jury to decide unless the court concludes that the jury must necessarily have had a reasonable doubt." *United States* v. *Warner*, 441 F.2d 821, 825 (C.A. 5), certiorari denied, 404 U.S. 829. The Tenth Circuit is in accord, *e.g.*, *United States* v. *Parrott*, 434 F.2d 294, 297 (C.A. 10), certiorari denied, 401 U.S. 979:

> [A]ppellant attacks the verdict on the ground that the evidence does not exclude every reasonable hypothesis but that of guilt. When the sufficiency of the evidence is challenged on appeal the test is not as appellant characterizes it. The sufficiency of the evidence shall be determined by a consideration of all the direct and circumstantial evidence, together with all inferences reasonably drawn therefrom. If, upon that consideration, there appears substantial evidence from which a jury can find an accused guilty beyond a reasonable doubt, the verdict will not be disturbed on appeal.

[2]Any challenge petitioner might be understood to be making to the sufficiency of the evidence to convict him must necessarily fail. Judged in the light most favorable to the government (*Glasser* v. *United States*, 315 U.S. 60, 80), the evidence of petitioner's guilt on both counts upon which he was convicted was clearly ample.

See also *United States* v. *Downen*, 496 F.2d 314, 318 (C.A. 10), certiorari denied, 419 U.S. 897. Thus, the law in the Fifth and Tenth Circuits is not inconsistent with the Sixth Circuit's holding in this case (Pet. App. B) that "circumstantial evidence need not remove every reasonable hypothesis except that of guilt." All three courts have followed the teaching of *Holland* v. *United States*, 348 U.S. 121, 139-140, and, accordingly, the conflict petitioner asserts does not exist.

2. Petitioner concedes (Pet. 17-18) that the denials by the district court of his first two motions for severance do not merit review by this Court.[3] Nor does the denial of his third motion. As the district court found (Pet. App. 7a-8a), the evidence at trial proved the existence of a single conspiracy to deal in stolen and counterfeit securities. Petitioner was shown to have been a primary participant in the dealings involving counterfeit stock. Contrary to his contention (Pet. 18), he was also proven to have had some involvement with the stolen securities, since it was his telephone call that apprised Pagoto that

[3]When joinder is proper under Rule 8, Fed. R. Crim. P., a motion for severance is committed to the discretion of the district court. See, *e.g.*, *United States* v. *Schaffer*, 362 U.S. 511; *Opper* v. *United States*, 348 U.S. 84. Here, joinder was proper because the offenses charged against the defendants were "of the same or similar character," and all defendants were alleged to have participated in one or more of them. That petitioner was not named on all of the substantive counts did not make joinder improper or necessarily warrant severance, since evidence of the commission of the substantive offenses by his co-defendants was admissible against him on the conspiracy count. See *United States* v. *Franks*, 511 F.2d 25 (C.A. 6), certiorari denied, No. 74-1281 (June 23, 1975); *United States* v. *Crockett*, 514 F.2d 64, 70-71 (C.A. 5).

As to petitioner's claim in respect of the check received from Cimini, petitioner at trial explained that he received it as payment for legal services (Tr. 2059, 2064, 2103-2104), and the district court's refusal to allow him to show that the legal services were rendered in connection with irrelevant convictions of a nontestifying defendant did not prejudice petitioner's substantial rights.

co-defendant Cimini had a "different way" to pay the amount owed on his new house. In any event, as a member of the overall scheme petitioner was liable for the acts committed by co-participants; accordingly, the evidence relating to the stolen securities would have been admissible even at a separate trial. *United States* v. *Felts*, 497 F.2d 80 (C.A. 5), certiorari denied, 419 U.S. 1051. Moreover, there was abundant proof of petitioner's guilt, and the district court instructed the jury to consider separately the guilt or innocence of each of the three defendants on trial (Tr. 2324). Under these circumstances, the denial of a severance was not an abuse of the district court's discretion.

3. Petitioner claims that the district court committed error by refusing to give limiting instructions in connection with hearsay evidence of co-conspirators' statements at the time such evidence was admitted. But the rule upon which petitioner relies, calling for instructions contemporaneous with admission, applies only in cases where the statements admitted were made after the conspiracy had ended and are offered to prove the declarant's participation in the conspiracy. *Lutwack* v. *United States*, 344 U.S. 604, 618. Petitioner does not claim that the conspiracy had ended when the co-conspirators' statements were made. Nor, indeed, does petitioner point to any such hearsay evidence which the jury improperly considered against him. Furthermore, petitioner did not object on hearsay grounds to any part of the district court's charge to the jury. Accordingly, there is no occasion for further review of this issue.

This Court has recently reaffirmed the co-conspirator exception to the hearsay rule, see *United States* v. *Nixon*, 418 U.S. 683, 701; petitioner's general attack on the exception suggests no sound reason for reconsidering the question.

4. Petitioner's complaint (Pet. 23) that he did not receive a "fair hearing" in the court of appeals is without substance. Even if petitioner had been denied all opportunity for oral argument, which he was not, and the court of appeals had affirmed with no opinion whatever, which it did not, the appellate process would not necessarily have been unfair. See *Taylor* v. *McKeithen*, 407 U.S. 191, 194-195 n. 4; *Federal Communications Commission* v. *WJR*, 337 U.S. 265, 274-277. Petitioner points to no circumstance indicating that the court of appeals did not give all of his arguments, numerous as they were, all the consideration they deserved.[4]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

RICHARD L. THORNBURGH,
Assistant Attorney General.

JEROME M. FEIT,
MERVYN HAMBURG,
Attorneys.

SEPTEMBER 1975.

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[4]Petitioner raises three additional contentions (Pet. 3-4) in addition to the claims already discussed, but states expressly (Pet. 27) that they are not urged as reasons why a writ of certiorari should issue, and accordingly we do not reply to them.

Supreme Court, U. S.
FILED
OCT 2 1975
MICHAEL RODAK, JR., CLERK

No. 74-1562

IN THE

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Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITIONER'S REPLY

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PETITIONER'S REPLY

I.

Holland did no more than condemn inconsistent-with-innocence language as appropriate for jury instructions. The principle, as a useful standard for measuring the ade-

quacy of proofs, was not altered.[1] Indeed, it was the very standard used by the *Holland* court.

> When the Government rests its case solely on the approximations and circumstantial inferences of a net worth computation, the cogency of its proofs depends upon its effective negation of reasonable explanation by the taxpayer inconsistent with guilt. 348 US at 135.

Two pages later the Court continued:

> But petitioners claim the government failed to adduce adequate proof because it did not negative all the possible nontaxable sources of the alleged net worth increases—gifts, loans, inheritances, etc. We cannot agree. The government's proof, in our view, carried with it the negatives the petitioners urge.

In *Barnes v. United States*, 412 US 837, 845 (1973), the Court again used the yardstick, there to sustain the conviction.

> The evidence . . . provided no plausible explanation for such possession consistent with innocence.

[1] The courts often recognize that a statement of a legal rule, useful to the profession, may not be proper for a jury instruction.

> What we write is written for minds drilled in the ways of the common law, skilled in applying legal abstractions to evidentiary facts, and not for the instruction of jurors. That frequently difficult task of jury instruction rests in the first instance with the trial judge who must translate our legal rulings, cast in the law's shorthand abstractions, into language comprehensible by the jury . . .
>
> *In Re Woods Estate*, 132 NW 2d 35, 45 (374 Mich 278, 1965).
>
> See also *Cuthbert* v *United States*, cited in our petition.

In *Ingram v. United States*, 360 US 672, 679, 680 (1959), the test was used to overturn a conviction.

> Here, the criminality of the enterprise under local law provided more than sufficient reason for the secrecy in which it was conducted . . . What was said in Direct Sales Co. v. United States on behalf of a unanimous Court is of particular relevance here: " . . . the evidence of knowledge [must not be] equivocal."

The government argues that the confusion of the lower courts on the proper standard has not yet stratified into a conflict of the Circuits, and therefore the issue is not ready for resolution here. Whether the premise of this proposition is true or not—the cases our petition cites substantially refute it—the issue should be settled.

If the reasonable doubt requirement of *Winship* cannot be defined more clearly than it has been by the lower courts, then, rather than a promise of fairness, it is a mere abracadabra useful only to soothe judicial consciences. We must admit to a jurisprudential anarchy under which a possibly innocent man's fate will turn upon the subjective view of the judge before whom he happens to appear rather than a rational rule of law. An innocent man facing the terror of a criminal prosecution is entitled to something more.[2]

[2] If we had a mandatory claim on this Court's jurisdiction, sufficiency of evidence would be our first point. But our petition recognizes that the primary responsibility for reviewing that issue rests with the Court of Appeals. *Hamling v. United States*, 418 US 87, 124 (1974). Thus, Footnote 2 of the government response is as inane as it is inaccurate.

II.

On p. 7, fn. 3, of its response, the government nakedly assets that petitioner was not prejudiced by the limitations on his proofs. Even the trial judge recognized that there was *some* prejudice to petitioner in his ruling. Responding to the artless suggestion of Government counsel that petitioner could simply say that the $3900 was for legal services, the trial judge said:

> [The jury] might not be convinced by an explanation that doesn't give to the jury all of the facts. Certainly you must consider, as a good lawyer, that from the defendant's point of view, that it may have more probative value for Mr. Meretsky to thoroughly explain what the $3900 was for than to simply say it was for legal services. (Tr. 1311)[3]

III.

We are chided for failing to point to any hearsay which the jury improperly considered against petitioner. (Government response, p. 8). Not having polled the jury on this point, we cannot comply. But, based solely on hearsay,

[3] Since petitioner did not receive one penny of the nearly half a million dollars garnered by Pagoto and Cimini in fraudulent loans, full explanation was crucial on the issue of whether petitioner had a stake and interest in the venture.

the Solicitor General attributes to petitioner authorship of an agreement which probably never existed.[4]

That trained counsel could make the mistake of implicating petitioner in the conspiracy on the basis of what Pagoto said that Cimini said, highlights the urgent need for some protection from hearsay for one attempting to defend himself from a conspiracy charge. A limiting instruction at the time the hearsay is received is the least that fairness requires.

Respectfully submitted,

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Dated: September 30, 1975.

[4] Petitioner prepared an agreement the terms of which prohibited Tomlinson from selling the stock . . . (Government response, p. 5).

No such agreement was introduced, and the only evidence concerning it was the following testimony of Pagoto.

> Q. What about the agreement?
> A. A copy of the agreement also were filed in—I was hypothicating the stock and the agreement that Mr. Kent Tomlinson wouldn't sell them or use them again in other transactions.
> Q. How did this agreement come up? Who first stated you needed an agreement?
> A. Mr. Cimini. He insisted on having an agreement at the other end.
> Q. And was there anything said by Mr. Cimini as to who was going to prepare this particular agreement?
> A. Yes, his attorney, Ross Meretsky.
> Q. And did Mr. Cimini tell you that?
> A. Yes, sir.

Petitioner's counsel did not object to this testimony. But he had already made two hearsay objections, coupled with a request for limiting instructions which were both denied.

> No legitimate state interest would have been served by requiring repetition of a patently futile objection, already trice rejected, in a situation in which repeated objection might well affront the Court or prejudice the jury beyond repair.
>
> *Douglas v. Alabama*, 380 US 415, 422 (1965).